IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 21636 of 2019

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE J.B.PARDIWALA

and
HONOURABLE MR. JUSTICE ILESH J. VORA

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	**Yes**
2	To be referred to the Reporter or not ?	**Yes**
3	Whether their Lordships wish to see the fair copy of the judgment ?	**No**
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	**No**

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MESSRS MAHALAXMI RUBTECH LTD.
Versus
UNION OF INDIA

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Appearance:
MR AMAL PARESH DAVE(8961) for the Petitioner(s) No. 1,2
MR PARESH M DAVE(260) for the Petitioner(s) No. 1,2
MR. PARTH H BHATT(6381) for the Respondent(s) No. 2
NOTICE SERVED(4) for the Respondent(s) No. 1

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CORAM: **HONOURABLE MR. JUSTICE J.B.PARDIWALA**
and
HONOURABLE MR. JUSTICE ILESH J. VORA

Date : 02/03/2021

ORAL JUDGMENT

(PER : HONOURABLE MR. JUSTICE J.B.PARDIWALA)

1 By this writ application under Article 226 of the Constitution of India, the writ applicant, a company, has prayed for the following reliefs:

"(A) That Your Lordships may be pleased to issue a writ of mandamus or any other appropriate writ, direction or order striking down circular No.36/2010-Cus dated 23.9.2010 (i.e. para 3(a) of this Circular) as ultra vires Section 149 of the Customs Act, 1962 and also ultra vires Articles 14 and 19(1)(g) of the Constitution of India;

(B) That Your Lordships may be pleased to issue a writ of certiorari or a writ of mandamus or any other appropriate writ, order or direction quashing and setting O/O No.AHM-CUSTOM-000-COM-007-19020 dated 30.09.2019 passed by the Principal Commissioner of Customs, Ahmedabad, the 2nd respondent herein, with a direction to this respondent to pay drawback of Rs.11,18,458/- to the petitioner.

(C) That Your Lordships may be pleased to issue a writ of mandamus or any other appropriate writ, direction or order directing the respondent No.2 herein to pay interest to the petitioner under Rule 14 of the Drawback Rules on the drawback amount of Rs.11,18,458/-.

(D) Pending hearing and final disposal of the present petition, Your Lordships may be pleased to direct the 2nd respondent herein to pay to the petitioner principal amount of drawback aggregating to Rs.11,18,458/- on the terms and conditions that may be deemed fit by this Hon'ble Court.

(E) An ex-parte ad-interim relief in terms of para 17(D) above may be kindly be granted;

(F) Any other further relief as may be deemed fit in the facts and circumstances of the case may also please be granted."

2 The facts giving rise to this writ application may be summarised as under:

2.1 The writ applicant is engaged in the business of manufacture of goods like printing blankets of rubber, etc. The company is also engaged in exporting such goods to the foreign countries. The present litigation has something to do with 41 consignments of the rubber printing blankets of different sizes exported by the writ applicant from the Inland Container Depot (ICD) at Sabarmati as well as the Ahmedabad Air Cargo Complex (ACC) between October, 2017 and November, 2018.

2.2 It is the case of the writ applicant that the export was in accordance with the customs procedure of issuing a shipping bill, an export invoice and other documents mentioning therein the full description of the goods and also their classification as well as the quantity and value of the goods.

2.3 It is the case of the writ applicant that the goods were exported for the fulfillment of the export obligations arising in respect of the EPCG (Export Promotion Capital Goods) Licences and as the writ applicant was under an impression that the due drawback was not allowed for the goods exported for fulfillment of obligations under the EPCG Scheme, the claim for drawback was not declared on the export document.

2.4 Sometime in December, 2018, the writ applicant came to know that the duty drawback at 1.5% of the FOB value was being allowed for the goods in question despite the fact that such goods were exported for

the fulfillment of the obligations under the EPCG Scheme.

2.5 The writ applicant started exporting the goods following the same procedure of mentioning the full description and value of the goods, classification of the goods and such other information and also declaring on the export document that the duty drawback was claimed.

2.6 The writ applicant preferred an application dated 28th January 2019 requesting the Commissioner of Customs to allow the amendment of 41 shipping bills lodged during the period between October, 2017 and November, 2018 by converting such shipping bills into drawback shipping bills by mentioning the claim for duty drawback on the shipping bills and invoices. The writ applicant invoked Section 149 of the Customs Act, 1962.

2.7 One another letter dated 25th July 2019 was submitted by the writ applicant requesting the Commissioner of Customs to allow the conversion of the shipping bills under Section 149 of the Customs Act.

2.8 The Commissioner of Customs, after giving an opportunity of hearing to the writ applicant, rejected the application preferred by the writ applicant on the ground that the CBEC in its circular No.36/2010 dated 23rd September 2010 in para 3(a) has provided that a request for conversion of the shipping bills should be made by the exporter within three months from the date of the Let Export Order (LEO) and as the request was beyond the time limit of three months, the benefits cannot be granted.

3 In view of the aforesaid, the writ applicant is here before this Court with the present writ application.

4 Mr. Paresh Dave, the learned counsel appearing for the writ applicant would submit that the legitimate export benefit has been denied only because the CBEC has provided by issuing the impugned circular that a request for conversion of the shipping bill should be made within 3 months from the date on which the good were allowed to be exported, however, this circular prescribing the time limit for the amendment of the export documents like the shipping bills are *ultra vires* Section 149 of the Customs Act, because Section 149 while providing for the amendment of documents nowhere lays down any such time limit for applying or requesting for amendment of a document like the shipping bill to avail the export benefits. The amendment of documents under Section 149 is permissible if any amendment is possible on the basis of documentary evidence which was in existence at the time the goods were cleared or exported; and therefore a procedural amendment by allowing an exporter to lodge his claim for any export benefit on the shipping bill is permissible under this provision if such amendment could be allowed on the basis of documentary evidence already in existence at the time the goods were exported. Section 149 of the Act prohibits a Customs officer from exercising his discretion in allowing the amendment of documents only when the amendment requested by the exporter is not possible upon examination of the goods or upon verification of details like the correct value of the goods or description and classification of the goods. No other condition, including any time limit, has been laid down under the provision for the purpose of allowing the amendment of documents, and therefore the circular issued by the Board prescribing a time limit of three months for the amendment of the export documents is beyond the scope of Section 149, and hence *ultra vires* this provision of the Customs Act.

5 Mr. Dave would submit that there is no other provision in the Customs Act that empowers the Board to impose any such restriction in

terms of the time limit for requesting conversion of the export documents, and in such circumstances also, the circular issued by the Board and the time limit prescribed for conversion of the export documents like the shipping bill is beyond the competence of the Board, and hence liable to be struck down as such. The petitioner's legitimate claim for the export benefits has been denied in this case on the basis of the above circular though there is no dispute about the description, quantity and classification of the exported goods nor about the value thereof; and therefore the impugned circular is also liable to be struck down as *ultra vires* Articles 14 and 19(1)(g) of the Constitution of India. It is submitted that in any case, the petitioner's claim for drawback can be allowed on the basis of the documentary evidence which was in existence at the time the goods were exported and therefore the action of the 2nd respondent in rejecting the petitioner's request for such export benefits deserves to be set aside in the interest of justice.

6 According to Mr. Dave, the amendment of any documents issued under the Customs Act, including a shipping bill, is authorized under Section 149 of the said Act without any restriction of time limit. Such provision for amendment of documents has been made in the Act to avoid undue hardships and prejudice that may be caused to an importer or an exporter on account of filing or lodging of any document with incorrect or inaccurate information in respect of the import or export of any goods. Since it is human to err, a possibility of any incorrect or wrong information being reported inadvertently in any documents filed under the Act cannot be ruled out. It is for correcting such inadvertent and unintentional errors, and to obviate genuine difficulties of a bonafide person filing any documents under the Act, that the provision for amendment of documents has been provided. Such beneficial provision cannot be tinkered with, and the benefits flowing from such beneficial provision cannot be curtailed by the CBEC; by prescribing time

limit of 3 months for making a request for the amendment of the export documents like a shipping bill as laid down by the CBEC vide para 3(a) of Circular No.36/2010-Cus. It is submitted that the same is *ex-facie* illegal and without justification; and such provision is *ultra vires* Section 149, and also *ultra vires* Article 14 of the Constitution.

7 Mr. Dave submitted that there are other provisions in the Act like the Sections 128, 129, 130 etc. where the Legislature has laid down the time limit; and thus it is clear that in cases where the legislature wanted to prescribe any time limit for taking any action, such time limit has been specifically laid down in the relevant provisions of the Act. When no time limit for making a request for amendment or any document is specified under Section 149 of the Act, it is clear that the legislature has not thought fit to restrict the scope of this provision for the amendment of the documents in terms of the time limit for making a formal request for such amendment. Section 149 of the Act or any other provision of the Customs Act does not confer any power or jurisdiction over the Board for laying down any time limit for operating this provision in respect of the amendment of documents; and therefore the time limit of 3 months laid down vide para 3(a) of circular No.36/2010-Cus is *ex-facie* illegal and without jurisdiction.

8 It is further submitted that the Bill of Entry is a document for the imported goods and the importer is required to furnish all the relevant details about the goods, like the description of the goods, quantity of the goods, classification of the goods, value of the goods, applicable rate of duties for the goods, any exemption Notification if applicable, the country of origin of the goods, the vessel that brought the goods to India etc. In the same way, a shipping bill is a document required to be filed by exporter of the goods furnishing therein all the relevant details of the exported goods, namely, the description of the goods, quantity of the

goods, value of the goods, details of the overseas buyer, details of the packings and containers etc. A bill of export is also a similar document for declaring such details in respect of exported goods.

9 In the last, Mr. Dave submitted that the documents, like the bill of entry, a shipping bill or a bill of export are the documents which are assessed by the proper Customs officer for the purpose of verifying whether the goods are prohibited for the import or export, as the case may be, and also the duties leviable thereon. By very nature of the assessment proceedings, such documents like a bill of entry, or a shipping bill or a bill of export can be effectively verified and assessed only when the goods were available for inspection, testing and analysis and verification of any other kind which would be ordinarily necessary for finalizing the classification of the goods and applicable duties thereon. If such documents are assessed and goods are allowed to be cleared for home consumption in case of imported goods or allowed to be cleared for export in case of export of goods, and subsequently a request for amendment of such documents is made and if such amendment could be made only upon verification of the good which would no longer be available with the Customs officers, only then the proviso to Section 149 does not authorize such amendment.

10 In such circumstances referred to above, Mr. Dave prays that there being merit in his writ application, the same be allowed and the reliefs, as prayed for, may be granted.

11 On the other hand, this writ application has been vehemently opposed by Mr. Utkarsh Sharma and Mr. Priyank Lodha, the two learned Standing Counsel appearing for the respondents. Both the learned Standing Counsel would submit that no error, not to speak of any error of law could be said to have been committed by the Principal

Commissioner in passing the impugned order. It is submitted that the issue raised by the writ applicant is squarely covered by a judgement of the Delhi High Court in the case of **M/s. Terra Films Pvt Ltd reported in 2011 (268) ELT 430**, wherein the Delhi High Court has taken the view that the request for conversion from one scheme to another after a long period of time cannot be entertained. It is submitted that in the case on hand also, the request is for "conversion" and not of "amendment".

12 In such circumstances referred to above, it is submitted that there being no merit in the present writ application, the same be rejected.

● **ANALYSIS:**

13 Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for our consideration is whether the Principal Commissioner committed any error in passing the impugned order.

14 We must first look into the impugned circular. Circular reads thus:

"Circular No36/2010-Cus. Dated 23-Sep-2010

Shipping Bills – Conversion of free shipping bills to Advance Authorization / DEPB / Drawback shipping bills and from one export promotion scheme to another – clarifications

Circular No.36/2010-Cus., dated 23-9-2010
F. No.109/121/2009-DBK

Government of India
Ministry of Finance (Department of Revenue)
Central Board of Excise & Customs, New Delhi

Subject : Conversion of free shipping bills to export promotion scheme shipping bills and conversion of shipping bills from one scheme to another – regarding.

I am directed to invite attention to the Board's Circular No.

4/2004-Cus., dated 16-1-2004 which debars conversion of free shipping bills to Advance License/DFRC/DEPB shipping bills and allows conversion of shipping bills from one export promotion scheme to another only where the benefit of an export promotion scheme claimed by the exporter has been denied by the DGFT/MoC&I or Customs due to any dispute.

2. It has been represented to the Board that the norms for allowing conversion of shipping bills may be relaxed and the Commissioners should be allowed to consider requests for conversion of shipping bills from free to export promotion scheme and from one export promotion scheme to another on a case to case basis depending on the merits of the case. It has also come to notice of the Board that the Tribunals in a series of judgments have held that amendment to shipping bill after export of goods is governed by the proviso to section 149 of the Customs Act, 1962 and if the requirements of the said proviso are satisfied, conversion of shipping bill should be allowed, The conversion of the shipping bill from one scheme to another cannot be linked with denial of benefit of one scheme by DGFT/MoC&l or Customs due to some dispute as no such condition for amendment of shipping bill has been provided in section 149 of Customs Act, 1962.

3. The issue has been re-examined in light of the above. It is clarified that Commissioner of Customs may allow conversion of shipping bills from schemes involving more rigorous examination to schemes involving less rigorous examination (for example, from Advance Authorization/DFIA scheme to Drawback/DEPB scheme) or within the schemes involving same level of examination (for example from Drawback scheme to DEPB scheme or vice versa) irrespective of whether the benefit of an export promotion scheme claimed by the exporter was denied to him by DGFT/DOC or Customs due to any dispute or not. The conversion may be permitted in accordance with the provisions of section 149 of the Customs Act, 1962 on a case to case basis on merits provided the Commissioner of Customs is satisfied, on the basis of documentary evidence which was in existence at the time the goods were exported, that the goods were eligible for the export promotion scheme to which conversion has been requested. Conversion of shipping bills shall also be subject to conditions as may be specified by the DGFT/MOC. <u>The conversion may be allowed subject to the following further conditions</u>;

(a) <u>The request for conversion is made by the exporter within three months from the date of the Let Export Order (LEO)</u>.

(b) On the basis of available export documents etc., the fact of use of inputs is satisfactorily proved in the resultant export product.

(c) The examination report and other endorsements made on the shipping bill/export documents prove the fact of export and the export product is clearly covered under relevant SION and or DEPB/Drawback Schedule as the case may be.

(d) On the basis of S/Bili/export documents, the exporter has fulfilled all conditions of the export promotion scheme to which he is seeking conversion.

(e) The exporter has not availed benefit of the export promotion scheme under which the goods were exported and no fraud/ misdeclaration / manipulation has been noticed or investigation initiated against him in respect of such exports.

4. Free shipping bills (shipping bills not filed under any export promotion scheme) are subject to 'nil' examination norms. Conversion of free shipping bills into EP scheme shipping bills (advance authorization, DFIA, DEPB, reward schemes etc.) should not be allowed. However, the Commissioner may allow Ali industry Rate of duty drawback on goods exported under free shipping bill, without conversion of such free shipping bill to Drawback Scheme shipping bill, in terms of the proviso to rule 12(1) (3) of the Customs, Central Excise and Service Tax Drawback Rules, 1995.

5. Due care may be taken while allowing conversion to ensure that the exporter does not take benefit of both the schemes i.e. the scheme to which conversion is sought and the scheme from which conversion is sought. Whenever conversion of a shipping bill is allowed, the same should be informed to DGFT so that they may also ensure that the exporter does not take benefit of both the schemes.

6. This Circular supersedes the Board Circular No. 4/2004-Cus., dated 16-1-2004 and the earlier Circulars issued in the past on this issue. This circular shall be applicable only to shipping bills filed on or after the date of issuance of this Circular. Till such time as EDI system is modified to allow conversion of shipping bill in the EDI system, conversion may be allowed manually.

7. A suitable Public Notice for information of the Trade and Standing Order for guidance of the staff may be issued. Difficulties faced, if any in implementation of the directions may be brought to the notice of the Board.

Kindly acknowledge receipt of this Circular."

15 We must now look into few provisions of the Customs Act, 1962.

Section 149 of the Customs Act reads thus:

> *"**Section 149. Amendment of documents**.—Save as otherwise provided in sections 30 and 41, the proper officer may, in his discretion, authorise any document, after it has been presented in the customs house to be amended:*
>
> *Provided that no amendment of a bill of entry or shipping bill or bill of export shall be so authorised to be amended after the imported goods have been cleared for home consumption or deposited in a warehouse, or the export goods have been exported, except on the basis of documentary evidence which was in existence at the time the goods were cleared, deposited or exported, as the case may be."*

16 We find merit in the principal argument of Mr. Dave that in Section 149 of the Act, no time period has been prescribed and if in a substantive statutory provision of law, if no time period has been prescribed, then the CBEC could not have issued the circular providing for three months time period to make a request for conversion from the date of the LEO.

17 The CBEC could have provided for a particular time limit only by way of regulations made in the Act. "Regulations" means the regulation made by the Board under any provisions of the Act, 1962. We take notice of the fact that Section 149 came to be amended after the filing of the present writ application. The amended Section 149 reads thus:

> *"In Section 149 of the Customs Act, after the words "customs house to be amended", the words "in such form and manner, within such time, subject to such restrictions and conditions, as may be prescribed" shall be inserted."*

18 Section 2(32) defines the term "prescribed". The same reads as under:

> *"**Section 2 Definitions**. —In this Act, unless the context otherwise requires,—*
>
> *… …*
>
> ***(32) "prescribed"** means prescribed by regulations made under this Act;*

19 Section 2(35) defines the term "regulations" . The same reads as under:

> ***"Section 2 Definitions**. —In this Act, unless the context otherwise requires,—*
>
> *… …*
>
> *(35) **"regulations"** means the regulations made by the Board under any provision of this Act;*

20 It is in the aforesaid context of the amended Section 149 of the Act referred to above that the definition of the two term "prescribed" and "regulations" respectively assumes importance.

21 A Coordinate Bench of this Court in the case of **Messrs Gokul Overseas vs. Union of India [Special Civil Application No.7500 of 2019 decided on 21st January 2020]** had the occasion to consider the very same issue at length. We quote the relevant observations:

> *"20.6 Lastly, it was contended that section 149 of the Act does not provide for any period of limitation for amending the shipping bills. It was submitted that it was on account of the conduct of the respondent authorities in not deciding the issue in question that there was a delay in making the application for amendment of the shipping bills. It was, accordingly, urged that the petition deserves to be allowed by directing the respondents to amend the shipping bills by permitting the same to be converted into MEIS and grant the benefits thereof.*
>
> *21. Opposing the petition, Mr. Nikunt Raval, learned senior standing counsel for respondents No.2, 3 and 5, invited the attention of the court to*

the Foreign Trade Policy 201520, whereby the MEIS came to be introduced. It was submitted that one of the prerequisites for claiming benefits under the said scheme in respect of Non-EDI shipping bills has been provided in para 3.14 of the Handbook of Procedure to the Foreign Trade Policy 201520, which requires that all exporters, while filing export shipments under all categories of shipping bills, are required to declare the following intent to claim benefit under the MEIS: "We intend to claim rewards under Merchandise Exports from India Scheme". It was submitted that in case of Non-EDI shipping bills, there is no question of tick-marking 'Y' or 'N'. The exporter may either declare the intent or not.

21.1 Reference was made to Public Notice No.40/20152020 dated 09.10.2015, to submit that benefit under the said public notice is given only in cases of EDI generated shipping bills, which require the exporters to tick mark "Y" in case they intend to claim benefits under the MEIS and "N" in case they do not intend to claim benefit under the MEIS. It was submitted that this is a case of Non-EDI shipping bills and that unless there is a 'Declaration of Intent' on the shipping bills, the same do not undergo any scrutiny for the grant of benefit under the MEIS. It was submitted that the purport of seeking waiver of such declaration on Non-EDI shipping bills would be larger as it would cover every Non-EDI shipping bills.

21.2 Reference was made to Circular No.36/2010Cus. Dated 23.09.2010, which provides for conversion of free shipping bills to Advance Authorisation/DEPB/Drawback shipping bills and from one export promotion scheme to another. It was submitted that clause (a) of para 3 thereof, specifically provides that the request for conversion can be made by the exporter within three months from the date of the Let Export Order (LEO). Attention was invited to para 4 of the said circular, which provides that free shipping bills (shipping bills not filed under any export promotion scheme) are subject to 'nil' examination norms. Conversion of free shipping bills into EP scheme shipping bills (advance authorization, DFIA, DEPB, reward schemes, etc.) should not be allowed. It was submitted that it is in these circumstances that the 'Declaration of Intent' is a prerequisite for claiming the benefit of incentive scheme and is not procedural and that what the petitioner seeks is the waiver of the prerequisite for obtaining the incentive.

21.3 It was submitted that the precondition for filing of 'Declaration of Intent' is applied on the class as a whole to Non-EDI shipping bills and that even otherwise, the petitioner is not entitled to the benefit in respect of some of the shipping bills, as they have been filed beyond the period of limitation. It was submitted that if the intention to avail benefits under the scheme is not declared in the shipping bills, the necessary process required for clearing the goods will be missed out.

21.4 It was, accordingly, urged that the mandate of the Circular dated 23.09.2010 for making application for conversion of shipping bills within a period of three months from the date of the Let Export Order cannot be waived and that the applications filed beyond the period of limitation have rightly been rejected by the respondent authorities. It was, accordingly, urged that the petition, being devoid of merits, deserves to be dismissed.

22. Mr. Nirzar Desai, learned senior standing counsel for respondents No.1, 4 and 6 submitted that the Customs Department is concerned with the amendment under section 149 of the Customs Act, 1962. It was submitted that the Circular dated 23.09.2010 provides that for the purpose of making amendment, the application should be made within a period of three months from the date of the Let Export Order. Referring to section 149 of the Act, it was submitted that the same permits the proper officer, in his discretion, to authorise any document, after it has been presented in the customs house to be amended. It was submitted that for conversion of shipping bills from free shipping bills to one under the export promotion scheme, the provisions of the Circular dated 23.09.2010 have to be satisfied, namely that the application has to be made within three months from the date of the Let Export Order. The Customs Department is bound by the said circular and more particularly, condition No.3 (a) thereof, which specifies a particular time limit for entertaining an application thereof.

22.1 It was submitted that the Customs Department has no discretion to extend the time limit, and hence, the said authorities were justified in not accepting the application made by the petitioner, which was filed beyond the time limit prescribed by the circular.

23. Chapter 3 of the Foreign Trade Policy 201520 has introduced the Merchandise Exports From India Scheme. The procedure for claiming benefit under the said scheme has been provided under the Handbook of Procedure to Foreign Trade Policy 201520. Para 3.14 thereof provides for the procedure for 'Declaration of Intent' on EDI and Non-EDI shipping bills for claiming benefits under the MEIS, including export of goods through courier or foreign post offices using e-Commerce. Sub-clause (i) of clause (a) thereof provides the procedure for 'declaration of intent' in case of EDI shipping bills; and sub-clause (ii) of clause (b) thereof provides the procedure for 'declaration of intent' on any EDI shipping bills. Para 3.14 of the Handbook of Procedure, reads as under:

"3.14 Procedure for Declaration of Intent on EDI and Non EDI shipping bills for claiming rewards under MEIS including export of goods through courier or foreign post offices using e-Commerce:

(a) (I) EDI Shipping Bills: Marking/ticking of "Y" (for Yes) in "Reward" column of shipping bills against each item, which is mandatory, would be

sufficient to declare intent to claim rewards under the scheme. In case the exporter does not intend to claim the benefit of reward under Chapter 3 of FTP exporter shall tick "N' (for No). Such marking/ticking shall be required even for export shipments under any of the schemes of Chapter 4 (including drawback), Chapter 5 or Chapter 6 of FTP.
(ii) Non-EDI Shipping Bills: In the case of non-EDI Shipping Bills, Export
shipments would need the following declaration on the Shipping Bills in order to be eligible for claiming rewards under MEIS: "We intend to claim rewards under Merchandise Exports From India Scheme (MEIS)". Such declaration shall be required even for export shipments under any of the schemes of Chapter 4 (including drawback), Chapter 5 or Chapter 6 of FTP.

(b) Whenever there is a decision during the financial year to include any new product/goods or new markets then to avail such rewards:

(i) For exports of such products/goods, to such markets, a grace period of one month from the date of notification/public notice will be allowed for making this declaration of intent.

(ii) After the grace period of one month, all exports (of such products/goods or to such markets) would have to include the declaration of intent on all categories of shipping bills.

(iii) For exports made prior to date of notification/ public notice of products/markets, such a declaration would not be required since such exports would have already taken place."

24. On a plain reading of the provisions of para 3.14 of the Handbook of Procedure to Foreign Trade Policy 201520, it is apparent that the 'declaration of intent', in the manner provided for EDI shipping bills, has been made mandatory, whereas in the case of Non-EDI shipping bills, such 'declaration of intent' is not stated to be mandatory. The respondents, in their affidavit in reply, have stated that the instant case is of a SEZ unit which exported the goods under free shipping bills. All the SEZ exports come under free shipping bills. Therefore, the mandatory 'declaration of intent' with effect from 01.06.2015 will not be applicable in this case. Therefore, the unit has to declare its intent for claiming benefits under the MEIS for exports made prior to 01.06.2015, that is, for the period between 01.04.2015 to 31.05.2015. As per the Foreign Trade Policy/Handbook of Procedure 201520, MEIS benefits were available to SEZ units with effect from 01.04.2015.

25. In case of EDI shipping bills, where it was mandatory to file the 'declaration of intent' in the manner provided in para 3.14 of the Handbook of Procedure to FTP (201520), vide Public Notice

40/20152020 dated 9th October,2015, it has been provided thus:

> *"2. As per para 3.14 of Hand Book of Procedure to FTP (201520), all exporters while filling export shipments under all categories of the shipping bills are required to declare the following intent to claim benefit under MEIS:*
> *"We intend to claim rewards under Merchandise Exports from India Scheme (MEIS)".*
>
> *Declaration of intent is mandatory with effect from June 1, 2015. CBEC has also issued a circular no. 14/2015 dated April 20, 2015, which requires mandatory declaration of intent from 1.6.2015 onwards. In EDI generated shipping bills, exporters are required to tick mark "Y" in case they intend to claim benefits under MEIS and "N" in case they do not intend to claim benefit under MEIS.*
>
> *3. In light of these circumstances and to address the matter, in exercise of powers conferred under paragraph 1.03 of the Foreign Trade Policy (20152020) read with reference to para 3.14 of Handbook of Procedures of FTP 201520, the Director General of Foreign Trade hereby allows the following procedure to be followed where exports have been made between 1.4.2015 to 31.5.2015, and where the exporter has inadvertently marked "N" in the "reward item box" and wishes to seek MEIS benefits:*
>
> *Exporters shall submit physical copies of free shipping bills after electronic filing Of application to RA at the time of submission of application for MEIS rewards in these cases. RA shall grant MEIS rewards after examination of such shipping bills in accordance with other provisions of FTP/HBP.*
>
> *4. From 01.06.2015, only those shipping bills, which are transmitted by Custom Authorities to DGFT, shall be considered under MEIS. Effect of this Public Notice:*
>
> *Shipping bills, where declaration of intent 'Y' has not been marked and 'N' has been ticked inadvertently in the 'reward item box' while filing shipping bill in Customs for exports made between 1.4.2015 to 31.5.2015, shall be transmitted by CBEC to DGFT."*

26. Vide Public Notice No.47/20152020 dated 08.12.2015, the procedure prescribed vide Public Notice No.40 dated 09.10.2015 has been extended beyond 31.05.2015 for the period from 01.06.2015 to 30.09.2015.

27. From the facts and contentions noted above, it emerges that the petitioner is not permitted conversion of the shipping bills from free

shipping bills to MEIS shipping bills for the reason that Circular No.36/2010Customs dated 23.09.2010 provides that conversion may be allowed provided that request has been made within three months from the date of the Let Export Order. The facts as recorded hereinabove reveal that the Deputy Commissioner of Customs, Kandla SEZ, Gandhidham (Office of the Development Commissioner, Kandla Special Economic Zone) has, in the context of the petitioner's request for amending the shipping bills to incorporate 'declaration of intent', has furnished comments on the issue to the respondent No.6 – Assistant Commissioner (Exports), Office of the Commissioner of Customs, Kandla, stating that the petitioner has been regularly filing its claim for similar goods under the MEIS for later periods and it appears that the petitioner is otherwise eligible for benefits under the said scheme. Therefore, in the light of the provisions of section 149 of the Act read with the provisions of Circular No.36/2010Customs dated 23.09.2010 and Notification No.40/2012(NT) dated 02.05.2012, the decision regarding conversion may be taken on the basis of documentary evidence which was in existence at the time when the goods were exported subject to the satisfaction of the competent authority.

28. Thus, the eligibility of the petitioner to claim benefits under the MEIS has not been doubted. The sole hurdle in the case of the petitioner is that since the shipping bills are free shipping bills, wherein no 'declaration of intent' has been made, the petitioner is required to get the shipping bills amended by incorporating the following 'declaration of intent': "We intend to claim rewards under Merchandise Exports From India Scheme (MEIS)".

29. In this case, the petitioner applied for the MEIS for the exports made during the period April 2015 to January 2016, under separate applications. The said applications were partly allowed and twenty five shipping bills were disputed. Vide letter dated 03.08.2016, the petitioner was informed by the respondent No.5 – Development Commissioner, that since there is no 'declaration of intent' on the shipping bills for claiming benefits under the MEIS, a reference has been sent to the respondent No.3 DGFT for a clarification whether such shipping bills (Non-EDI) prior to 01.06.2015 were eligible for benefits under the MEIS benefits or not. Therefore, till that time, its claim will be kept pending. Thus, the claim was kept pending by the concerned authorities.

30. Vide letter dated 06.06.2017, the petitioner requested the respondent No.4 – Commissioner of Customs, Kandla, to allow benefits under the MEIS on the shipping bills in case the 'declaration of intent' was not mentioned on exports made prior to 01.06.2015, whereupon the petitioner was advised/informed to comply with the amendment in the form of conversion of shipping bills from free to MEIS, whereafter, the petitioner applied for conversion of shipping bill.

31. Subsequently, vide communication dated 18/19.07.2017, the

petitioner was informed that the shipping bills are required to be amended by the competent authority under section 149 of the Act and was requested to approach the proper officer of Customs under section 149 of the Act, whereupon the petitioner, on 01.08.2017, requested the competent authority to amend the shipping bills under section 149 of the Act at the earliest.

32. Thus, the respondents had not informed the petitioner immediately to get the shipping bills converted into one under the MEIS. It was only after a lot of inter se communication, that the petitioner was advised to get the shipping bills amended and converted to MEIS shipping bills. Upon the petitioner making such application for amendment, after prolonged inter se communications between the respondents as to who had the jurisdiction to decide said application, the same came to be turned down on the ground that the application for amendment had been made beyond three months as stipulated in Circular 36/2010-Customs dated 23rd September, 2010.

33. Circular 36/2010-Customs dated 23rd September, 2010 provides for conversion of free shipping bills to Advance Authorisation/ DEPB/Drawback shipping bills and from one export promotion scheme to another. Clause (a) of paragraph 3 thereof provides that the conversion may be allowed subject to the conditions laid down thereunder. Condition (a) thereof reads thus: "Request for conversion is made by the exporter within three months of the date of the Let Export Order (LEO)". From paragraph 4 of the circular, the reason for providing such time limit appears to be that free shipping bills (shipping bills not filed under any export promotion scheme) are subject to 'nil' examination norms.

34. In the facts of the present case, as noticed earlier, it is not the case of the respondents that the petitioner is not otherwise covered by Circular No.36/2010Customs dated 23.09.2010. The sole ground on which the application has been rejected is for non compliance of condition (a) of paragraph 3 of the said circular, namely that the application has been filed beyond a period of three months from the date of filing the Let Export Order.

35. At this juncture, it may be apposite to refer to the decision of the Delhi High Court in Kedia (Agencies) Pvt. Ltd. v. Commissioner of Customs, 2017 (348) ELT 634 (Del.), on which reliance has been placed by the learned advocate for the petitioner, wherein the question that arose for consideration was: "Did the CESTAT fall into error in upholding the denial of the petitioner's claim for amendment of its shipping document under section 149 of the Customs Act." The court held thus:

> *"7. In the present case, the appellant had been consistently dealing with the same goods and exporting them previously for over three*

years. The precondition of a declaration along with the relative forms, for grant of benefit was introduced on 142008 through an amendment to the Handbook of Procedures. It is now settled law that the provisions of the Foreign Trade (Development & Regulation) Act, 1992, the rules or regulations framed thereunder and the export import policy have the force of law. Handbook of Procedures and the amendments carried out thereto are per se not declaration of law but only impose conditions which are to be fulfilled and otherwise conform to the requirements of law. Without making a deeper analysis of these legal provisions, the facts of this case reveal that the export goods are essentially agricultural produce and continued to be covered as an item eligible for benefit. At the time, just prior to 142008, the goods had been exported as free shipping bills. The exporter/appellant's fault here is that it did not file the requisite declaration. In all other respects, I.e. as to whether they conform to the description in the shipping documents and the value, etc. continues to be ascertainable because the concerned bills, invoices and other shipping documents are available with the customs authorities.

8. Having regard to these, we are of the opinion that in the peculiar circumstances of the case, the omission to file the declaration of the kind we are concerned with, when all other relative materials are present was not vital to the appellant's case. The material which did and does exist is substantial; the appellant should, therefore, be permitted to amend its shipping bill. The respondents are directed to give effect to this order within the next two months. The appeal is consequently allowed."

36. In the opinion of this court, the above decision would be squarely applicable to the facts of the present case. As is evident from the letter dated 07/08.09.2019 (Annexure-O to the petition), the Deputy Commissioner of Customs, Kandla SEZ, Gandhidham (Office of the Development Commissioner, Kandla Special Economic Zone) has, in the context of the petitioner's request for amendment in the shipping bills to incorporate 'declaration of intent', furnished comments for specific recommendations on the issue to respondent No.6 – Assistant Commissioner (Exports), Office of the Commissioner of Customs, Kandla, stating that the petitioner is filing regularly its claim for similar goods under MEIS for later periods and it appears that the petitioner is, otherwise, eligible for the said scheme. Therefore, in the light of the provisions of section 149 of the Act read with the provisions of Circular No.36/2010-Customs dated 23.09.2010 and Notification No.40/2012(NT) dated 02.05.2012, the decision regarding conversion may be taken on the basis of documentary evidence which was in existence at the time when the goods were exported, subject to the satisfaction of the competent authority.

37. Thus, except for the fact that the request for conversion of the free shipping bill to MEIS shipping bill has been made beyond the time prescribed in Circular No.36/2010-Customs dated 23.09.2010, no other objection has been raised on behalf of the respondents. In the opinion of this court, having regard to the peculiar facts of the present case, the omission to file 'declaration of intent' when all other relevant material is available, is not fatal to the petitioner's case. As in the case of Kedia (Agencies) Pvt. Ltd. v. Commissioner of Customs (supra), in the facts of the present case also, in all other respects, that is, as to whether the goods conform to the description in the shipping documents and the value, etc. continues to be ascertainable because the concerned bills, invoices and other shipping documents are available with the customs authorities. The respondents are, therefore, not justified in turning down the request to convert the shipping bills of the petitioner from free to MEIS and thereby depriving the petitioner of the benefits under the MEIS in respect of exports made under such shipping bills.

38. In the light of the above discussion, the petition succeeds and is, accordingly, allowed. The impugned letter dated 11.02.2019 of the respondent No.2, Under Secretary, Government of India, is hereby quashed and set aside. The respondents are directed to permit the petitioner to convert the shipping bills in question from free shipping bills to MEIS shipping bills subject to the satisfaction of the competent authority. The respondents shall give effect to this order within two months from the date of receipt of copy of this order. Rule is made absolute accordingly, with no order as to costs."

22 In one of the recent pronouncements by a Coordinate Bench of this Court, in the case of **M/s. Raj and Company vs. Union of India [Special Civil Application No.17804 of 2019 decided on 8th February 2021]**, we find reference of **M/s Gokul Overseas (supra)**. We quote the relevant observations:

"11. This Court in case of Messrs Gokul Overseas (supra) was requested to direct the respondent to allow the benefits under the MEIS under five different applications and to accept the amendment in shipping bills with a declaration made by a separate communication. The petitioner was the partnership firm situated at Kandla Special Economic Zone and was engaged in the manufacturing of derivatives of Castor Oils and cleared its final product to export and was also a certified Three Star Export House. In MEIS, it sought to promote export of notified goods manufactured in India. The Court referred to five different kind of duties scrips with varying conditions attached to their use and all these had merged into a single

scheme MEIS. For export made during April, 2015 to January, 2016 the request was made to grant the benefit. The petitioners were requested to allow benefits on the shipping bills where declaration of intent was not mentioned prior to 01.06.2015 and also requested to extend the benefit of the Public Notice dated 09.10.2015 to Non-EDI shipping bills. In this background, the Court in detail considered the procedure for declaration of intent on EDI and Non-EDI shipping bills as provided under Chapter 3 of the FTP 201520 and also referred to the decision of Delhi High Court rendered in case of Kedia (Agencies) Pvt. Ltd. v. Commissioner of Customs, reported in 2017 (348) ELT 634 (Del.). In case of MESSRS GOKUL OVERSEAS (supra) the Court has held and observed thus:

> *"23. Chapter 3 of the Foreign Trade Policy 201520 has introduced the Merchandise Exports From India Scheme. The procedure for claiming benefit under the said scheme has been provided under the Handbook of Procedure to Foreign Trade Policy 201520. Para 3.14 thereof provides for the procedure for 'Declaration of Intent' on EDI and Non-EDI shipping bills for claiming benefits under the MEIS, including export of goods through courier or foreign post offices using e-Commerce. Sub-clause (I) of clause (a) thereof provides the procedure for 'declaration of intent' in case of EDI shipping bills; and sub-clause (ii) of clause (b) thereof provides the procedure for 'declaration of intent' on any EDI shipping bills. Para 3.14 of the Handbook of Procedure, reads as under:*
>
> *"3.14 Procedure for Declaration of Intent on EDI and Non EDI shipping bills for claiming rewards under MEIS including export of goods through courier or foreign post offices using eCommerce:*
>
> *(a) (i) EDI Shipping Bills: Marking/ticking of "Y" (for Yes) in "Reward" column of shipping bills against each item, which is mandatory, would be sufficient to declare intent to claim rewards under the scheme. In case the exporter does not intend to claim the benefit of reward under Chapter 3 of FTP exporter shall tick "N' (for No). Such marking/ticking shall be required even for export shipments under any of the schemes of Chapter 4 (including drawback), Chapter 5 or Chapter 6 of FTP.*
>
> *(ii) Non-EDI Shipping Bills: In the case of non-EDI Shipping Bills, Export shipments would need the following declaration on the Shipping Bills in order to be eligible for claiming rewards under MEIS: "We intend to claim rewards under Merchandise Exports From India Scheme (MEIS)". Such declaration shall be required even for export shipments under any of the schemes of Chapter 4 (including drawback), Chapter 5 or Chapter 6 of FTP.*
>
> *(b) Whenever there is a decision during the financial year to*

include any new product/goods or new markets then to avail such rewards:

(i) For exports of such products/goods, to such markets, a grace period of one month from the date of notification/public notice will be allowed for making this declaration of intent.

(ii) After the grace period of one month, all exports (of such products/goods or to such markets) would have to include the declaration of intent on all categories of shipping bills.

(iii) For exports made prior to date of notification/ public notice of products/markets, such a declaration would not be required since such exports would have already taken place."

24. On a plain reading of the provisions of para 3.14 of the Handbook of Procedure to Foreign Trade Policy 201520, it is apparent that the 'declaration of intent', in the manner provided for EDI shipping bills, has been made mandatory, whereas in the case of NonEDI shipping bills, such 'declaration of intent' is not stated to be mandatory. The respondents, in their affidavit in reply, have stated that the instant case is of a SEZ unit which exported the goods under free shipping bills. All the SEZ exports come under free shipping bills. Therefore, the mandatory 'declaration of intent' with effect from 01.06.2015 will not be applicable in this case. Therefore, the unit has to declare its intent for claiming benefits under the MEIS for exports made prior to 01.06.2015, that is, for the period between 01.04.2015 to 31.05.2015. As per the Foreign Trade Policy/Handbook of Procedure 201520, MEIS benefits were available to SEZ units with effect from 01.04.2015.

25. In case of EDI shipping bills, where it was mandatory to file the 'declaration of intent' in the manner provided in para 3.14 of the Handbook of Procedure to FTP (201520), vide Public Notice 40/20152020 dated 9th October,2015, it has been provided thus:

"2. As per para 3.14 of Hand Book of Procedure to FTP (201520), all exporters while filling export shipments under all categories of the shipping bills are required to declare the following intent to claim benefit under MEIS: "We intend to claim rewards under Merchandise Exports from India Scheme (MEIS)". Declaration of intent is mandatory with effect from June 1, 2015. CBEC has also issued a circular no. 14/2015 dated April 20, 2015, which requires mandatory declaration of intent from 1.6.2015 onwards. In EDI generated shipping bills, exporters are required to tick mark "Y" in case they intend to claim benefits under MEIS and "N" in case they do not intend to claim benefit under MEIS.

3. In light of these circumstances and to address the matter, in exercise of powers conferred under paragraph 1.03 of the Foreign

Trade Policy (20152020) read with reference to para 3.14 of Handbook of Procedures of FTP 201520, the Director General of Foreign Trade hereby allows the following procedure to be followed where exports have been made between 1.4.2015 to 31.5.2015, and where the exporter has inadvertently marked "N" in the "reward item box" and wishes to seek MEIS benefits:

Exporters shall submit physical copies of free shipping bills after electronic filing Of application to RA at the time of submission of application for MEIS rewards in these cases. RA shall grant MEIS rewards after examination of such shipping bills in accordance with other provisions of FTP/HBP.

4. From 01.06.2015, only those shipping bills, which are transmitted by Custom Authorities to DGFT, shall be considered under MEIS.

Effect of this Public Notice:

Shipping bills, where declaration of intent 'Y' has not been marked and 'N' has been ticked inadvertently in the 'reward item box' while filing shipping bill in Customs for exports made between 1.4.2015 to 31.5.2015, shall be transmitted by CBEC to DGFT."

26. Vide Public Notice No.47/20152020 dated 08.12.2015, the procedure prescribed vide Public Notice No.40 dated 09.10.2015 has been extended beyond 31.05.2015 for the period from 01.06.2015 to 30.09.2015.

27. From the facts and contentions noted above, it emerges that the petitioner is not permitted conversion of the shipping bills from free shipping bills to MEIS shipping bills for the reason that Circular No.36/2010Customs dated 23.09.2010 provides that conversion may be allowed provided that request has been made within three months from the date of the Let Export Order. The facts as recorded hereinabove reveal that the Deputy Commissioner of Customs, Kandla SEZ, Gandhidham (Office of the Development Commissioner, Kandla Special Economic Zone) has, in the context of the petitioner's request for amending the shipping bills to incorporate 'declaration of intent', has furnished comments on the issue to the respondent No.6 – Assistant Commissioner (Exports), Office of the Commissioner of Customs, Kandla, stating that the petitioner has been regularly filing its claim for similar goods under the MEIS for later periods and it appears that the petitioner is otherwise eligible for benefits under the said scheme. Therefore, in the light of the provisions of section 149 of the Act read with the provisions of Circular No.36/2010Customs dated 23.09.2010 and

Notification No.40/2012(NT) dated 02.05.2012, the decision regarding conversion may be taken on the basis of documentary evidence which was in existence at the time when the goods were exported subject to the satisfaction of the competent authority.

28. Thus, the eligibility of the petitioner to claim benefits under the MEIS has not been doubted. The sole hurdle in the case of the petitioner is that since the shipping bills are free shipping bills, wherein no 'declaration of intent' has been made, the petitioner is required to get the shipping bills amended by incorporating the following 'declaration of intent': "We intend to claim rewards under Merchandise Exports From India Scheme (MEIS)".

29. In this case, the petitioner applied for the MEIS for the exports made during the period April 2015 to January 2016, under separate applications. The said applications were partly allowed and twenty five shipping bills were disputed. Vide letter dated 03.08.2016, the petitioner was informed by the respondent No.5 – Development Commissioner, that since there is no 'declaration of intent' on the shipping bills for claiming benefits under the MEIS, a reference has been sent to the respondent No.3 DGFT for a clarification whether such shipping bills (NonEDI) prior to 01.06.2015 were eligible for benefits under the MEIS benefits or not. Therefore, till that time, its claim will be kept pending. Thus, the claim was kept pending by the concerned authorities.

30. Vide letter dated 06.06.2017, the petitioner requested the respondent No.4 – Commissioner of Customs, Kandla, to allow benefits under the MEIS on the shipping bills in case the 'declaration of intent' was not mentioned on exports made prior to 01.06.2015, whereupon the petitioner was advised/informed to comply with the amendment in the form of conversion of shipping bills from free to MEIS, whereafter, the petitioner applied for conversion of shipping bill.

31. Subsequently, vide communication dated 18/19.07.2017, the petitioner was informed that the shipping bills are required to be amended by the competent authority under section 149 of the Act and was requested to approach the proper officer of Customs under section 149 of the Act, whereupon the petitioner, on 01.08.2017, requested the competent authority to amend the shipping bills under section 149 of the Act at the earliest.

32. Thus, the respondents had not informed the petitioner immediately to get the shipping bills converted into one under the MEIS. It was only after a lot of inter se communication, that the petitioner was advised to get the shipping bills amended and

converted to MEIS shipping bills. Upon the petitioner making such application for amendment, after prolonged inter se communications between the respondents as to who had the jurisdiction to decide said application, the same came to be turned down on the ground that the application for amendment had been made beyond three months as stipulated in Circular 36/2010Customs dated 23rd September, 2010.

33. Circular 36/2010Customs dated 23rd September, 2010 provides for conversion of free shipping bills to Advance Authorisation/DEPB/Drawback shipping bills and from one export promotion scheme to another. Clause (a) of paragraph 3 thereof provides that the conversion may be allowed subject to the conditions laid down thereunder. Condition (a) thereof reads thus: "Request for conversion is made by the exporter within three months of the date of the Let Export Order (LEO)". From paragraph 4 of the circular, the reason for providing such time limit appears to be that free shipping bills (shipping bills not filed under any export promotion scheme) are subject to 'nil' examination norms.

34. In the facts of the present case, as noticed earlier, it is not the case of the respondents that the petitioner is not otherwise covered by Circular No.36/2010Customs dated 23.09.2010. The sole ground on which the application has been rejected is for non compliance of condition (a) of paragraph 3 of the said circular, namely that the application has been filed beyond a period of three months from the date of filing the Let Export Order.

35. At this juncture, it may be apposite to refer to the decision of the Delhi High Court in Kedia (Agencies) Pvt. Ltd. v. Commissioner of Customs, 2017 (348) ELT 634 (Del.), on which reliance has been placed by the learned advocate for the petitioner, wherein the question that arose for consideration was: "Did the CESTAT fall into error in upholding the denial of the petitioner's claim for amendment of its shipping document under section 149 of the Customs Act." The court held thus:

"7. In the present case, the appellant had been consistently dealing with the same goods and exporting them previously for over three years. The precondition of a declaration along with the relative forms, for grant of benefit was introduced on 142008 through an amendment to the Handbook of Procedures. It is now settled law that the provisions of the Foreign Trade (Development & Regulation) Act, 1992, the rules or regulations framed thereunder and the export import policy have the force of law. Handbook of Procedures and the amendments carried out thereto are per se not

declaration of law but only impose conditions which are to be fulfilled and otherwise conform to the requirements of law. Without making a deeper analysis of these legal provisions, the facts of this case reveal that the export goods are essentially agricultural produce and continued to be covered as an item eligible for benefit. At the time, just prior to 142008, the goods had been exported as free shipping bills. The exporter/appellant's fault here is that it did not file the requisite declaration. In all other respects, I.e. as to whether they conform to the description in the shipping documents and the value, etc. continues to be ascertainable because the concerned bills, invoices and other shipping documents are available with the customs authorities.

8. Having regard to these, we are of the opinion that in the peculiar circumstances of the case, the omission to file the declaration of the kind we are concerned with, when all other relative materials are present was not vital to the appellant's case. The material which did and does exist is substantial; the appellant should, therefore, be permitted to amend its shipping bill. The respondents are directed to give effect to this order within the next two months. The appeal is consequently allowed."

36. In the opinion of this court, the above decision would be squarely applicable to the facts of the present case. As is evident from the letter dated 07/08.09.2019 (AnnexureO to the petition), the Deputy Commissioner of Customs, Kandla SEZ, Gandhidham (Office of the Development Commissioner, Kandla Special Economic Zone) has, in the context of the petitioner's request for amendment in the shipping bills to incorporate 'declaration of intent', furnished comments for specific recommendations on the issue to respondent No.6 – Assistant Commissioner (Exports), Office of the Commissioner of Customs, Kandla, stating that the petitioner is filing regularly its claim for similar goods under MEIS for later periods and it appears that the petitioner is, otherwise, eligible for the said scheme. Therefore, in the light of the provisions of section 149 of the Act read with the provisions of Circular No.36/2010Customs dated 23.09.2010 and Notification No.40/2012(NT) dated 02.05.2012, the decision regarding conversion may be taken on the basis of documentary evidence which was in existence at the time when the goods were exported, subject to the satisfaction of the competent authority.

37. Thus, except for the fact that the request for conversion of the free shipping bill to MEIS shipping bill has been made beyond the time prescribed in Circular No.36/2010Customs dated 23.09.2010, no other objection has been raised on behalf of the respondents. In the opinion of this court, having regard to the

peculiar facts of the present case, the omission to file 'declaration of intent' when all other relevant material is available, is not fatal to the petitioner's case. As in the case of Kedia (Agencies) Pvt. Ltd. v. Commissioner of Customs (supra), in the facts of the present case also, in all other respects, that is, as to whether the goods conform to the description in the shipping documents and the value, etc. continues to be ascertainable because the concerned bills, invoices and other shipping documents are available with the customs authorities. The respondents are, therefore, not justified in turning down the request to convert the shipping bills of the petitioner from free to MEIS and thereby depriving the petitioner of the benefits under the MEIS in respect of exports made under such shipping bills.

38. In the light of the above discussion, the petition succeeds and is, accordingly, allowed. The impugned letter dated 11.02.2019 of the respondent No.2, Under Secretary, Government of India, is hereby quashed and set aside. The respondents are directed to permit the petitioner to convert the shipping bills in question from free shipping bills to MEIS shipping bills subject to the satisfaction of the competent authority. The respondents shall give effect to this order within two months from the date of receipt of copy of this order. Rule is made absolute accordingly, with no order as to costs."

12. The Court thus had recognised the fact that the eligibility of the petitioner to claim benefits under the MEIS scheme has not been questioned. The only hurdle was that the shipping bills were free shipping bills and there was no declaration of intent made. The petitioner needed to get the shipping bills amended by incorporating the declaration of intent as provided under the MEIS and it had taken aid of various circulars to allow that petition.

13. In the instant case, as noted hereinabove, there is no doubt with regard to the exports having been made under the FTP 201520 where, initially, Sri Lanka was not one of the countries where such reward was available on export to the said country. The petitioner has already exported its product 'vitrified tiles' to Sri Lanka and 73 shipping bills have also been produced before the respondent authorities. What has been pleaded all through out by the petitioner is of lack of knowledge of subsequent public notices which had included Sri Lanka as a country for seeking the reward under the MEIS and entire procedure having been simplified, instead of getting the declaration produced for the purpose of the reward, the ticking of N/Y would suffice in case of the EDI. The ticking itself had been made equivalent to such declaration. It is quite clear that for the purpose of the reward, the EDI has been simplified more particularly, by way of the Public Notice No.9 of 2015 dated 16.05.2016

and the marking of tick in pursuance of the earlier Public Notice No.47 dated 08.12.2015 had been treated as a declaration of intent in case of EDI shipping bills.

14. What we notice is that in case of Messrs Gokul Overseas (supra) even the conversion has been permitted by the Court, whereas in the instant case, it is only the question of the EDI bills where inadvertently instead of 'Yes' the ticking was on 'N'. As provided in case of Pasha International vs. Commissioner of Customs (supra) by Madras High Court, this has to be construed as pure and simple mistake on the part of the exporter, when otherwise the respondent has not questioned any of the shipping bills and it is only because the declaration of intent on the said shipping bills for claiming the benefits under the MEIS, the subsequent claim made by him on the EDI is questioned on the ground that Section 149 of the Customs Act would not be applicable.

15. We are of the opinion that the decisions which have been discussed hereinabove coupled with the very object of the MEIS would not allow us to endorse to the stand taken by the respondent authority, even if, the subsequent notices, which have been relied upon for denying the benefits by virtue of the communication dated 10.06.2019 do not prescribe the time limit, the reasonable time could be regarded as this request is made at the end of one year.

16. ***We also agree with the submissions made by the learned advocate for the petitioner that Section 149 of the Customs Act, 1962 which has been taken recourse to by the petitioner does not prescribe any time limit. It is a discretion of the concerned officer, which can authorize any document after it has been presented in the Custom House to be amended. Of course, this has not to be amended after once the imported goods have been cleared for the home consumption and deposited in the warehouse where export goods have been exported, except on the basis of the documentary evidences, which are in existence at the time of the clearance, deposit or the export of the goods, as the case may be. In the electronic age, all procedures have been simplified and the EDI is essentially keeping pace with the electronic age. The simplification of this process shall have to be viewed for the benefit of the exporters for whose benefit the scheme has been brought by the Centre as availment of benefits is in no manner going to have any bearing adversely on the exchequer; And, even otherwise, it is essentially to avail the exporter the benefits prescribed under the MEIS that the request has been sent by the petitioner to make the same available to it. Therefore, it is also expected of the respondent authority to adopt an approach, giving progressive interpretation to all these provisions and the policy decisions rather than having conventional outlook.***

> *17. We also cannot overlook a noticeable fact in this communication where there is a specific reference of the decision of the High Court of Madras and the approach which has been adopted by the authority. It has chosen to state that, it is mandamus in nature and case specific, without realising that the decision shall have to be applied to the facts of every case by reading the ratio and once the facts are similar, application of ratio is the discipline expected of all concerned."*

23 In the case before the Delhi High Court, the request by the exporter **M/s. Terra Films Pvt. Ltd.** was for the conversion of "DEPB/DEEC Shipping Bills" into "DEEC/DEPB-cum-Drawback Shipping Bills", and also for fixing the **brand rate** of Drawback for the goods already exported. In para 3 of the judgement of the Delhi High Court, the extracts from the order of the CESTAT are reproduced. The following sentence recorded in the CESTAT order would indicate that brand rate under the Drawback Rules was to be determined for the goods exported more than before one year: "The apprehension of the Learned SDR that in respect of the goods already exported during the year 2004 and 2005, **to cause verification to fix the brand rate** under the Drawback Rules is physically impossible deserves to be taken into account. ……".

24 In the case on hand, the request is for conversion of the EPCG shipping bill into the EPCG-cum-Drawback shipping bill, for Drawback at **all India rate** of 1.5% of value of the exported goods.

25 Under Rule 3 of the Drawback Rules, a Drawback is allowed on the export of goods **at such amount, or at such rates,** as may be determined by the Central Government. Such rates determined by the Central Government are called "All industry rate", because Drawback at such rates is allowed to all the exporters in the country without any conditions. This is because all the industry rates are determined by the Central Government on the basis of the general data collected from the

industry about utilization of duty paid inputs, input services etc. While allowing such All industry rate of Drawback, no verification of the exported goods is required, and hence no verification is undertaken also by the Custom authorities. But there may be cases where the rate of Drawback has not been determined, and such cases are covered under Rule 6. Where no All India rate of Drawback is determined in respect of any goods, the manufacturer/exporter has to apply within 3 months from the relevant date for fixation of Drawback rate in his individual case, and all the relevant facts **including the proportion in which the materials or components or input services are used in the production or manufacture of goods and the duties paid on such materials or components or the tax paid on input services** have to be submitted with such application as mandated under Sub Rule (1) of Rule 6. Thereafter, as laid down under Clause (b) of Rule 6(1), the proper Revenue Officer would make an enquiry and determine the amount or rate of Drawback in respect of **such goods;** which is the brand rate for that particular case.

26 Since the Petitioner M/s. Terra Films Pvt. Ltd. before the Delhi High Court was claiming Drawback at the **brand rate,** proper verification and enquiry into the raw materials, components and input services used by them and also the duties and taxes actually paid on such input transactions were required to be conducted. Only then, the brand rate of drawback could have been fixed for the goods exported by the said exporter. But the goods were exported by M/s. Terra Films Pvt. Ltd. during September, 2004 to April, 2005 (as recorded in para 2 of the judgement), and the request for conversion of the shipping bills and brand rate fixation was made in January, 2006; and therefore the CESTAT held that it was physically impossible to undertake the verification **to fix the brand rate** under the Drawback Rules in respect

of the goods already exported during year 2004 and 2005. While upholding this decision of the CESTAT, the Delhi High Court has observed at para 6 of the judgement as under:

> *"For enabling an exporter to draw the benefit of any scheme, not only physical verification of documents would be required, but as is noted by both the authorities below, the* ***verification of the goods of export as also their examination by the Customs*** *was necessarily required to be done. In the given factual circumstances, that was rightly held to be impossible ……."*

27 In the present case, no verification whatsoever of the goods or any examination of the exported goods is required, because the claim for Drawback is at the All industry rate, which is the common and general rate fixed by the Central Government for all exporters of the goods in the country. If the writ applicant herein had been claiming Drawback at the special brand rate, then the amendment of shipping bills by allowing conversion into Drawback shipping bill may not be possible only on the basis of the documentary evidence which was in existence at the time the goods were cleared for export. For fixing brand rate, examination of the goods and also verification of the goods as well as inputs, raw materials, input services etc. used for such goods would be necessary; and such verification would be impossible once the goods have been exported. But for Drawback at All industry rate, the only requirement would be to consider the export documents where the description, quantity and value of the goods have been recorded, and verified as well as assessed by the Custom Officers while allowing clearance of the goods for export. On the value so assessed by the Custom officers, the calculation of Drawback at All industry rate is only an arithmetical exercise, which could be easily done on the basis of the documentary evidence (i.e. the export documents like shipping bill and export invoice) which was in existence when the goods were cleared for export.

28 The judgement of the Delhi High Court is for a case where the claim was for fixation of brand rate of Drawback and paying Drawback at special brand rate, and therefore, the denial of the exporter's claim in that case could be said to be in accordance with the Scheme of Section 149 of the Customs Act read with Rule 6 of the Drawback Rules.

29 The Delhi High Court has not followed the judgement in case of M/s. Terra Films Pvt. Ltd. while deciding a subsequent case of M/s. Kedia Agencies (P) Ltd. reported in **2017 (348) ELT 634 (Del.);** and it is observed at para 7 of judgement in Kedia Agencies (P) Ltd. as under:-

> *"……at the time, just prior to 1.4.2008, the goods had been exported as free shipping bills. The exporter/appellant's fault here is that it did not file the requisite declaration. In all other respects, i.e. as to whether they conform to the description in the shipping documents and the value etc., continues to be ascertainable because the concerned* ***bills, invoices and other shipping documents*** *are available with the Custom authorities."*

30 This latter judgment in Kedia Agencies (P) Ltd. referred to above has been considered by this Court in **M/s. Raj and Company (supra)**. decided on 8th February 2021 and concurred with. In para 11 of the judgement in M/s. Raj and Company, the relevant paras 23 to 38 of the judgement of this Court in M/s. Gokul Overseas have been reproduced, wherein the judgement in case of M/s. Kedia Agencies Pvt. Ltd. also stands specifically referred to at para 35 of M/s. Gokul Overseas. The judgement in case of M/s. Terra Films Pvt. Ltd. has been distinguished by the Delhi High Court itself in its subsequent decision of **M/s. Kedia Agencies Pvt. Ltd. (supra)**.

31 Since in the present case, the amendment of shipping bills by

converting them into Drawback shipping bills is possible on the basis of the documentary evidence which was in existence at the time the goods were cleared for export and the benefit of Drawback at All industry rate of 1.5% of value of the exported goods is also possible to be allowed, the judgement of the Delhi High Court in case of M/s. Terra Films Pvt. Ltd. is not applicable.

32 In view of the aforesaid discussion, we hold that the impugned circular to the extent of para 3(a) is *ultra vires* Articles 14 and 19(1)(g) of the Constitution of India as also *ultra vires* Section 149 of the Customs Act, 1962.

33 In the result, this writ application succeeds and is hereby allowed. The impugned order passed by the Principal Commissioner of Customs, Ahmedabad is hereby quashed and set aside. It is declared that the writ applicant is entitled to the drawback of Rs.11,18,458/- being the principal amount with statutory interest as provided in Rule 14 of the Drawback Rules.

34 The requisite amount shall be paid to the writ applicant within a period of four weeks from the date of receipt of the writ of this order.

(J. B. PARDIWALA, J)

(ILESH J. VORA,J)

CHANDRESH